Filed 4/30/19 Schultz v. City of Hope National Medical Center CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GARY D. SCHULTZ, Plaintiff and Respondent, v. CITY OF HOPE NATIONAL MEDICAL CENTER, Defendant and Appellant.	B287185 (Los Angeles County Super. Ct. No. BC659416)

APPEAL from an order of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed in part and reversed in part with directions.

Davis Wright Tremaine, Emilio G. Gonzalez and Vandana Kapur for Defendant and Appellant.

LOVE and Richard A. Love for Plaintiff and Respondent.

City of Hope National Medical Center (Medical Center) appeals an order denying its motion to compel arbitration of an employment discrimination action filed by its former employee, Gary D. Schultz (Schultz). The trial court found that Medical Center could not establish a valid arbitration agreement and that an arbitration clause in a signed offer letter, incorporating the terms of an arbitration policy from Medical Center's personnel manual, was not enforceable. Schultz also sued City of Hope,[1] the Beckman Research Institute of the Medical Center, Jonathan Reuter, and Richard Lea Gann II (collectively, defendants).[2] Regarding the nonsignatory defendants, the trial court found that they had not consented to arbitration, despite joining Medical Center's motion to compel. For the reasons set forth below, we reverse the order as it pertains to Medical Center only.

FACTUAL AND PROCEDURAL BACKGROUND

The essential facts are not in dispute. In mid-September 1999, Schultz applied to Medical Center in Los Angeles for the position of director of corporate real estate, interviewing a total of three times. After the third interview, a representative from Medical Center called Schultz, who was then living in Phoenix, and offered him the job, which he orally accepted. The representative did not mention an arbitration agreement as a condition of acceptance. Schultz subsequently resigned from his job, terminated his apartment lease, and prepared to move to

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[1] This entity is distinct from Medical Center.

[2] Reuter is Medical Center's vice president of supply chain, facilities, and construction management. Gann is Medical Center's senior director of corporate real estate.

California, where he already had a permanent residence and where his family lived.

At the time he was hired, Schultz was a licensed attorney working as a senior manager in the corporate real estate department of a large healthcare company in Phoenix, Arizona.

On September 30, 1999, the Medical Center representative faxed Schultz an offer letter. The letter was two pages long and reflected the terms of compensation and benefits that Schultz and Medical Center had negotiated. However, the offer letter also contained a paragraph that Medical Center's representative had not mentioned, stating: "By signing this letter, you consent that any dispute or controversy between you and the . . . Medical Center, including without limitation any claims for breach of contract, statute or public policy, personal injury (tort), employment discrimination, or any other claim of any type arising out of or in connection with the termination of your employment, will be submitted to and determined by final binding arbitration in Los Angeles, California in accordance with the provisions of the . . . Medical Center personnel policy manual in effect at the time the demand for arbitration is filed." Schultz tried to contact the representative who had made the verbal offer but was unable to reach him. He made no other attempts to contact Medical Center or negotiate the terms of the offer letter. Instead, Schultz signed the letter and returned it to Medical Center that same day.

Under the incorporated terms of Medical Center's personnel manual, an arbitration award was final and binding on all parties, Medical Center was responsible for the arbitrator's fee, and the parties had to mutually agree on an arbitrator who was required to issue a written opinion stating the factual and

legal grounds for the decision. The arbitration policy also allowed the arbitrator to order the losing party to pay or reimburse any administrative or filing fees charged by the American Arbitration Association.

Schultz resigned from Medical Center in April 2017. Schultz then sued Medical Center and defendants. Schultz alleged that all defendants were agents of each other and his direct and joint employers. Schultz alleged that he was forced to resign due to intolerable work conditions and that he was constructively terminated. The defendants filed a joint answer, asserting as an affirmative defense that Schultz agreed to arbitrate his claims.

Medical Center moved to compel arbitration and the other defendants joined in the motion "to the extent that they are named parties in this matter." Medical Center attached Schultz's offer letter and its arbitration policy from the personnel manual that was in effect at the time Schultz filed his lawsuit. Medical Center argued that its offer letter was a valid and enforceable arbitration agreement, that the related terms from the personnel manual were properly incorporated into the agreement, and that Schultz's status as an attorney weighed heavily against finding the agreement unconscionable. Schultz responded that, despite signing the offer letter, he had not agreed to arbitrate and was never provided with the arbitration policy in the personnel manual. Schultz submitted a declaration which stated that because he had terminated his lease, quit his job, and moved his belongings, he had no choice but to sign the offer letter. Alternatively, Schultz argued that the agreement was limited to Medical Center and did not include the nonsignatory defendants.

The trial court denied Medical Center's motion, ruling that "[t]here is no binding contract to arbitrate. There is no explanation as to what the arbitration would consist of; there could not be as the letter says that arbitration would be 'by terms in the personnel manual in effect at the time that Notice of Arbitration is filed.' [¶] It is procedurally unconscionable as it was 'take it or leave it' and substanti[vely] unconscionable in that there is not any indication as to what the arbitration will consist of. [¶] None of the other parties have agreed to be bound by arbitration."

This timely appeal followed.

DISCUSSION

I. This court's jurisdiction

Before deciding the merits of Medical Center's appeal, we must address Schultz's arguments that we lack jurisdiction to address either all or some of the issues before us.[3]

First, Schultz contends that only an order denying a "petition" to compel arbitration is an appealable order while an order denying a "motion" is not. Schultz's argument elevates form over substance and is contrary to the well-established rule that a denial of a motion to compel arbitration is an appealable order. (Code Civ. Proc., § 1294, subd. (a); *Valentine Capital Asset Management, Inc. v. Agahi* (2009) 174 Cal.App.4th 606, 612, fn. 5.) It is of no consequence that Medical Center used the term "motion" instead of "petition" because the lawsuit was already pending when Medical Center moved to compel arbitration. (See,

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[3] While the appeal was pending, Schultz filed a motion to dismiss the appeal on the same grounds. For the same reasons discussed in this opinion, Schultz's motion is denied.

e.g., *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 349.)

Second, Schultz argues that we do not have jurisdiction over the other named defendants because, although they joined in Medical Center's motion, they did not file a notice of appeal. Thus, Schultz contends that the nonappealing defendants are bound by the trial court's order and we are precluded from considering the portion of the judgment affecting the nonappealing parties.

"It is well settled that upon an appeal from a portion of the judgment only the appellate court has no jurisdiction to review any part of the judgment except the part to which the appeal is directed and that an order of reversal, although general in terms, will be construed to apply only to the part brought up for review." (*Lake v. Superior Court* (1921) 187 Cal. 116, 120.) " '[W]here several persons are affected by a judgment, the reviewing court will make no determination detrimental to the rights of those who have not been brought into the appeal.' " (*Gonzales v. R.J. Novick Constr. Co.* (1978) 20 Cal.3d 798, 806.)

Accordingly, we consider that portion of the order pertaining to Medical Center only, and not the nonappealing defendants.

II. Standard of review and the law of arbitration

" 'On appeal from the denial of a motion to compel arbitration, "we review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law." ' " (*Baxter v. Genworth North America Corp.* (2017) 16 Cal.App.5th 713, 722.) When the trial court's denial turns on the resolution of contested facts, we review the order for substantial evidence. (*Ibid.*) Because the

essential facts are undisputed here, we apply the de novo standard of review. (*Ibid.*)

Under "both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate." (*Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 683.) There is a " ' " 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution' " ' " and courts will " ' " ' "indulge every intendment to give effect to such proceedings." ' " ' " (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 568.) Under California law, "arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 98, fn. omitted (*Armendariz*).) However, "[t]here is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate." (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) " 'Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived.' " (*Adajar*, at p. 569.)

The party seeking to compel arbitration bears the burden of proving a valid agreement while the opposing party must prove any defense to that agreement. (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 59.)

III. Medical Center established a valid arbitration agreement

Medical Center provided the offer letter to Schultz which included a general arbitration agreement that incorporated its arbitration policy from its personnel manual. It is generally

sufficient for a party to prove the existence of an arbitration agreement by providing a copy of the contract to the court. (*Baker v. Italian Maple Holdings, LLC* (2017) 13 Cal.App.5th 1152, 1161.) Schultz does not dispute that he signed the offer letter. Thus, Medical Center has met its burden to prove the existence of a valid agreement to arbitrate. The burden therefore shifts to Schultz to prove a defense to the enforcement of the agreement. (*Ibid.*)

A. *The agreement complies with* Armendariz

Schultz argues that the arbitration agreement does not meet the minimum requirements for a mandatory employment arbitration agreement set forth by our Supreme Court in *Armendariz*, *supra*, 24 Cal.4th at page 102. *Armendariz* prohibits, among other things, an employer from imposing additional costs in arbitration that are beyond what the employee would incur if he or she were bringing the claim in court. (*Ibid.*)

Schultz contends that the arbitration agreement cannot meet the additional cost requirement because, under the terms of the incorporated personnel manual, the arbitrator has "the authority to order that any administrative or filing fees charged by the American Arbitration Association or other referral source be paid or reimbursed by the losing party." Although this outcome is speculative and may be remote, the law is clear that "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Armendariz*, *supra*, 24 Cal.4th at pp. 110–111.) Therefore, the fee provision does not comply with *Armendariz*.

That being said, a single offending provision will not necessarily invalidate an entire arbitration agreement. (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 710 (*Serpa*).) When "the arbitration agreement is not otherwise permeated by unconscionability, the offending provision, which is plainly collateral to the main purpose of the contract, is properly severed and the remainder of the contract enforced." (*Ibid.*) In exercising its discretion, the trial court must look to the various purposes of the contract. "If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Armendariz*, *supra*, 24 Cal.4th at p. 124.)

Accordingly, the trial court is ordered to sever the fee provision authorizing the arbitrator "to order that any administrative or filing fees charged by the American Arbitration Association or other referral source be paid or reimbursed by the losing party."

B. *The arbitration agreement is not unconscionable*

In addition to meeting the *Armendariz* requirements, an arbitration agreement must not be unconscionable. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246–247 (*Pinnacle*).) Unconscionability has both procedural and substantive elements. (*Armendariz*, *supra*, 24 Cal.4th at p. 99.) Both elements must be met to invalidate an agreement, but they need not be present to the same degree. (*Id.* at p. 114.) "[T]he more substantively oppressive the contract term, the less evidence of procedural

unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Ibid.*)

"Procedural unconscionability focuses on the elements of oppression and surprise. [Citation] ' " 'Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice . . . . Surprise involves the extent to which the terms of the bargain are hidden in a "prolix printed form" drafted by a party in a superior bargaining position.' " ' " (*Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 480.) Substantive unconscionability is present if the terms of the agreement create an overly harsh or one-sided result. (*Armendariz*, *supra*, 24 Cal.4th at p. 114.)

1. Procedural unconscionability

Schultz argues that the arbitration policy was procedurally unconscionable on several grounds. Schultz contends, the agreement was an impermissible adhesion contract presented on a "take it or leave it basis." The essence of Schultz's argument is that, by the time he received the offer letter, he had already accepted the position, quit his prior job, and moved out of his apartment. Therefore, he had no choice but to accept the additional arbitration agreement in the offer letter.

As an initial matter, "[i]t is well settled that adhesion contracts in the employment context, that is, those contracts offered to employees on a take-it-or-leave-it basis, typically contain some aspects of procedural unconscionability." (*Serpa*, *supra*, 215 Cal.App.4th at p. 704.) Thus, the offer letter's "take it or leave it" nature is not dispositive in and of itself.

Rather, Schultz's contention that he had no choice but to sign the agreement is belied by the undisputed facts. Schultz does not contend that Medical Center set a timeline for him to

sign and return the offer letter. Yet, on the same day he received the offer letter, Schultz signed and returned it to Medical Center. Schultz made one unsuccessful attempt to contact Medical Center after receiving the letter, but he did not otherwise protest the agreement.

Further, it is not clear that there was the usual disparity in bargaining power typically present in an employer-employee context. In addition to being a licensed attorney, Schultz's resume stated that he had a "[s]trong background in negotiating real estate transactions and managing diverse real estate portfolios" and performing "due diligence." Indeed, Schultz negotiated his compensation with Medical Center and secured "a base salary at the top of the salary range." (See *Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 981 (*Dotson*).) These circumstances weigh against a finding of procedural unconscionability.

Moreover, Medical Center interviewed Schultz over a period of two weeks, during which Medical Center told Schultz that his resume was the "most impressive" it had seen for the position. By the time Medical Center sent Shultz the offer letter, its representative had already informed him by phone of its intent to hire him, thus giving him a certain amount of leverage to negotiate the terms of his employment contract. Additionally, by making a verbal commitment to Schultz prior to sending him the offer letter, Medical Center could have been subject to liability if it rescinded the offer after Schultz had quit his job, terminated his lease, and moved to California, thereby further weakening its bargaining power with respect to Schultz. "[A]n employer cannot expect a new employee to sever his former employment and move across the country only to be terminated

before the ink dries on his new lease, or before he has had a chance to demonstrate his inability to satisfy the requirements of the job." (*Sheppard v. Morgan Keegan & Co.* (1990) 218 Cal.App.3d 61, 67.)

Nor can Schultz argue unfair surprise. The arbitration agreement appeared within the two-page offer letter and referred Schultz to Medical Center's personnel manual for the specific terms of its arbitration policy. It was not hidden in a "prolix printed form" (*Pinnacle*, *supra*, 55 Cal.4th at pp. 246–247) or buried, for example, in the fine print of a complex and lengthy commercial lease. As a licensed attorney with significant professional experience in real estate, Schultz is presumed to understand the effect of a written contract and the incorporation of terms from separate documents.

It is also not necessary that an arbitration agreement spell out every term of the arbitration procedure but it instead "may do so in a secondary document which is incorporated by reference." (*Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271; see, e.g., *Serpa, supra*, 215 Cal.App.4th at p. 705; *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 (*Cruise*).) The offer letter states clearly and unequivocally that arbitration will be governed by the terms of the personnel manual in effect at the time of the dispute.

Even if the arbitration agreement did not properly incorporate the terms of the personnel manual or if Medical Center was unable to establish the terms of its arbitration policy as they existed at the time Schultz signed the offer letter, it would not preclude finding an enforceable agreement. For example, in *Cruise*, *supra*, 233 Cal.App.4th at page 399 the arbitration clause was in an employment application. The

arbitration clause incorporated by reference an arbitration policy in an employee handbook. (*Id.* at pp. 392–393.) *Cruise* found that the employer's failure to establish the exact terms of its arbitration policy when the employee signed the application did not otherwise relieve the employee of his duty to arbitrate the dispute. (*Id.* at p. 399.) The parties mutually agreed to arbitrate, but any arbitration would be governed by the California Arbitration Act as opposed to the terms of the incorporated arbitration policy. (*Id.* at pp. 399–400.)

2. Substantive unconscionability

Where there is a low degree of procedural unconscionability, there must be a high degree of substantive unconscionability to render the agreement unenforceable. (*Dotson v. Amgen, Inc.*, *supra*, 181 Cal.App.4th at p. 982.) "Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided. One such form, as in *Armendariz*, is the arbitration agreement's lack of a ' "modicum of bilaterality," ' wherein the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration." (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071–1072.)

We fail to see the one-sidedness of either the arbitration agreement contained in the offer letter or the related terms of the personnel manual. The personnel manual states that "[a]n employee or [Medical Center] may bring an action to compel arbitration, to seek to vacate an arbitration award and to enforce an arbitration award in a court of competent jurisdiction." Similarly, the arbitration provision in the offer letter imposes an arbitration obligation on both Schultz and Medical Center, since it states: "By signing this letter, you consent that any dispute or

controversy between you and the . . . Medical Center, including without limitation any claims for breach of contract, statute or public policy, personal injury (tort), employment discrimination, or any other claim of any type arising out of or in connection with the termination of your employment, will be submitted to and determined by final binding arbitration." The agreement is bilateral and requires that any dispute between the parties be submitted to mandatory and binding arbitration.[4]

Schultz contends that the arbitration agreement is substantively unconscionable because Medical Center had the unfettered right to unilaterally change the arbitration terms in its personnel manual, making the agreement illusory. This argument overstates Medical Center's rights under the agreement. Regardless of its ability to modify the terms of agreement, Medical Center was bound by the covenant of good faith and fair dealing implied in every contract, which prohibits unfairly frustrating the other party's right to receive the benefits of the agreement actually made. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349.) The covenant of good faith and fair dealing applies with equal force to an agreement between employer and employee when the employer has the unilateral

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[4] Conversely, Schultz also argues that the language in Medical Center's arbitration policy is discretionary with him because it states that "[a]ny arbitable dispute . . . *may* be referred to final and binding arbitration." (Italics added.) Courts have rejected this interpretation of the word "may" and have held that similarly worded agreements required bilateral arbitration. (*Service Employees Internat. Union, Local 18 v. American Building Maintenance Co.* (1972) 29 Cal.App.3d 356, 358; *Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 595.)

right to modify its personnel manual. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1214.) Medical Center's unilateral right to modify its own personnel manual did not render the agreement illusory.

Since the degree of both procedural and substantive unconscionability is low, the arbitration agreement remains valid and enforceable.

IV. Medical Center did not waive its right to arbitrate

Schultz alternatively argued in the trial court that Medical Center waived its right to arbitrate. Because the trial court found the arbitration agreement unenforceable, it did not reach the issue of waiver. Nonetheless, we may consider the issue for the first time on appeal because it involves a question of law based on undisputed facts established by the record. (*California Horse Racing Bd. v. Workers' Comp. Appeals Bd.* (2007) 153 Cal.App.4th 1169, 1173.)

The factors courts can consider when determining waiver are: " '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the

opposing party.' " (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992.)

None of the *Sobremonte* factors are present here. This lawsuit was filed on April 28, 2017 and served on May 8, 2017. On June 23, 2017, the day after Medical Center filed its answer, it informed Schultz's counsel that it would seek to enforce the arbitration provision. On August 1, 2017, Medical Center filed its motion to compel arbitration and secured the first available hearing date. Medical Center's actions have been consistent with their intent to arbitrate, the litigation remains in its infancy, and the parties have engaged in minimal discovery.

Schultz's argument that Medical Center delayed filing its motion to use civil discovery to learn about his strategy, evidence, and witnesses and to pin him to a particular set of facts is not supported. Schultz has failed to identify any discovery that would not have been available in the arbitral forum, asserting only that discovery in arbitration would be discretionary. Schultz's argument that Medical Center waited to file their motion to compel arbitration until July 2017 ignores the fact that Schultz did not file his lawsuit until April 2017. Therefore, there was only a three-month delay from the time Schultz filed his complaint to when Medical Center moved to compel arbitration. (See, e.g., *Khalatian v. Prime Time Shuttle, Inc.* (2015) 237 Cal.App.4th 651, 661 [finding no waiver when delayed filing 14 months].) There is no waiver here.

DISPOSITION

The order is reversed as to City of Hope National Medical Center only. The trial court is directed to enter a new order granting City of Hope National Medical Center's motion to compel arbitration and to sever the offending fee provision. In all other respects, the order is affirmed. City of Hope National Medical Center is awarded its costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

MURILLO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.